Supreme Court, U.S.
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No. 09-750

In the Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES.,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of all sizes and in all industries.[1] The Chamber advocates issues of vital concern to the nation's business community in matters before the courts, Congress, and the Executive Branch. The Chamber frequently appears as an *amicus* in this Court in cases that affect the interests of American businesses and the public welfare, drawing on the vast experience of its members to illustrate the practical ramifications of legal disputes. And when misguided decisions of lower courts on matters of great importance threaten the interests of the business community and the greater public, the Chamber supports petitions for this Court's review. This is such a case.

This case addresses the meaning and scope of the work product privilege codified in Federal Rule of Civil Procedure 26(b)(3), which protects from discovery

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record for all parties were notified ten days prior to filing and have consented to the filing of this brief. Counsel for Petitioner filed a blanket letter of consent with this Court on January 4, 2010, and a letter of consent from Respondent has been submitted to the Clerk concurrently with this filing.

materials "prepared in anticipation of litigation or for trial." The First Circuit's decision artificially limits this privilege to documents prepared "for use" in litigation. Pet.App. 11a-18a. That construction departs from the text of Rule 26(b)(3), rendering "in anticipation of litigation" meaningless, and divorces the rule from its underlying purpose—to protect attorneys' theories, strategies, and assessments of potential and ongoing litigation, whether prepared "for use" in litigation or not. From a practical perspective, moreover, the "for use" test ignores the manner in which modern businesses rely upon legal counsel. If not reversed, the First Circuit's decision will gravely impact the ability of businesses to make well-informed, prudent decisions and ensure compliance with the law.

"In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law . . . .'" *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (citation omitted). Numerous decisions routinely facing American businesses require an assessment of potential liability and litigation strategies and risks. These run the gambit from internal investigations evaluating legal risks and ensuring compliance with the law to mandatory analyses of potential liabilities for financial reporting purposes and legal assessments undertaken to evaluate or accomplish complex corporate transactions. All require counsel candidly to assess litigation risks, legal strategies, and settlement positions. Yet, because they are generally *not* prepared "for use" in litigation, the First Circuit's decision renders counsel's recorded analyses and impressions wholly discoverable by

litigation adversaries, who will use them as a "roadmap" in the litigation—undermining the traditional notions of justice in our adversary system that this Court sought to protect through the work product privilege. Under the First Circuit's narrow conception of the privilege, "[i]nefficiency, unfairness and sharp practices" will "inevitably develop in the giving of legal advice," and "[a]n attorney's thoughts, heretofore inviolate," will "not be his own." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). If left standing, the First Circuit's fundamentally misguided rule will not only frustrate businesses' legitimate interests in proactive investigation, prudent decisionmaking, and legal compliance, but will also harm the interests of regulatory agencies and the greater public in fostering corporate self-reporting and compliance with an increasingly-complex array of regulations governing corporate conduct.

The decision below exacerbates a vexing conflict among the Courts of Appeals about the meaning and scope of the work product privilege, and no interests would be served by delaying this Court's review. By announcing a new and far more limited standard that conflicts with the law of every other circuit, the First Circuit's opinion creates great uncertainty for companies that have come to rely on the work product privilege in carrying out every transaction, investigation, and action that calls for litigation analysis. Because many businesses never can be certain where work product issues will be litigated, the First Circuit's "for use" test threatens, *de facto*, to become the law of the land. The Chamber urges this Court to grant *certiorari* now to provide members of the business community with clear guidance on the

scope of the work product privilege and clarify the approach courts should use in determining whether materials are protected under Rule 26(b)(3). There is no reason to allow this issue to percolate any further. As Judge Torruella stated in his dissent below, "[t]he time is ripe for the Supreme Court to intervene and set the circuits straight on this issue which is essential to the daily practice of litigators across the country." Pet.App. 45a (Torruella, J., dissenting).

ARGUMENT

I. THE FIRST CIRCUIT'S DECISION IGNORES THE LANGUAGE OF RULE 26(B)(3) AND THE PURPOSES OF THE WORK PRODUCT PRIVILEGE

"Nowhere does Rule 26(b)(3) state that a document must have been prepared to aid in the conduct of litigation in order to constitute work product, much less primarily or exclusively to aid in litigation." *United States v. Adlman*, 134 F.3d 1194, 1198 (2d Cir. 1998). To the contrary, Rule 26(b)(3) expressly protects from discovery those materials "prepared in anticipation of litigation or for trial." As this Court has recognized, the rule covers more than materials prepared for use in litigation: "Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney *in contemplation of litigation* which set forth the attorney's theory of the case and his litigation strategy." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975) (emphasis added). Under its "for use" test, however, the First Circuit has effectively limited the work product privilege to materials prepared "for use in" litigation, rendering "in anticipation of

litigation" meaningless. This narrowing construction finds no support in the text or well-established rules of construction, which dictate that "no provision ... be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality).

The First Circuit's interpretation also undermines the purposes of the work product privilege. This Court first endorsed the work product privilege in *Hickman v. Taylor*, 329 U.S. 495 (1947). *Hickman* held that an attorney's witness interview memoranda, created during the course of an accident investigation, were protected "attorney work product" and thus not discoverable in subsequent litigation arising from the accident. *Id.* at 511. The Court's conclusion was grounded both in common law and practical considerations—privacy, efficiency and fairness in the administration of justice. As the Court explained, "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 510. Our adversarial system requires that an attorney be able to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Id.* at 511. Thus, the "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs"—the core "work product of the lawyer"—must be privileged. *Id.* Otherwise, "much of what is now put down in writing would remain unwritten," and "[a]n attorney's thoughts, heretofore inviolate, would not be his own." *Id.* These "historical and ... necessary" principles, *id.*, which lay the foundation for Rule 26(b)(3), *Upjohn*, 449 U.S. at 398 (1981), "promote

justice," "protect ... clients' interests," and are essential to "an orderly working of our system of legal procedure," *Hickman*, 329 U.S. at 511-12. Without the work product privilege, "[i]nefficiency, unfairness, and sharp practices would inevitably develop." *Id.* at 511.

The forced disclosure of Textron's tax accrual workpapers violates the fundamental principles that animated this Court in *Hickman*. These workpapers include spreadsheets and supporting documentation that together reflect the opinions of Textron's attorneys about the company's potential tax liability, including the likelihood that Textron would prevail in litigation with the IRS over Textron's tax positions. *See* Pet.App. 92a-93a. The First Circuit nonetheless excluded Textron's tax accrual workpapers from the protection of the privilege based on its finding that they are "independently required by statutory and audit requirements." Pet.App. 9a.[2] But there is "no basis for adopting a test under which an attorney's assessment of the likely outcome of litigation is freely available to his litigation adversary merely because the document was created for a business purpose rather than for litigation assistance." *Adlman*, 134 F.3d at 1200. Regardless of whether counsel's evaluation of potential litigation is created "for use" in that litigation

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[2] This finding, however, is not supported by law or the record. Although companies create tax accrual workpapers to assist in the financial reporting process, no statute, regulation or audit standard requires the creation of such documents. Moreover, when the Financial Accounting Standards Board ("FASB") promulgated FASB Interpretation No. 48: Accounting for Uncertainty in Income Taxes (June 2006), FASB stated that it "does not intend to imply a documentation requirement" in connection with a company's accounting for contingent tax reserves in its financial statements. *Id.* at app. A, ¶A1.

or—like Textron's tax accrual workpapers—for another purpose that requires the anticipation and analysis of litigation, it may equally comprise "analys[es] that candidly discuss[] the attorney's litigation strategies, appraisal[s] of likelihood of success, and perhaps the feasibility of reasonable settlement," thus "fall[ing] squarely within *Hickman*'s area of primary concern." *Id.* When businesses analyze their tax accrual positions for purposes of financial reporting, they must, as a practical matter, turn to counsel. This is manifest under current U.S. Generally Accepted Accounting Principles ("GAAP") reporting requirements. In 2006, FASB explained that the analysis of whether a company is likely to succeed in its tax position—and thus whether it must accrue for and disclose a potential loss—"is a matter of judgment based on the facts and circumstances of that position evaluated in light of all available evidence." FASB Interpretation No. 48, at 5. It is also "a matter of tax law" and, "in some cases, the law is subject to varied interpretation, and whether a tax position will ultimately be sustained may be uncertain." *Id.* at 2. A company must consider the ultimate result of a challenge to its tax positions through litigation, and also must presume that tax authorities have complete knowledge of all relevant information.

The potential for litigation in these circumstances, moreover, is very real. *Every* tax return filed by Textron is audited by the IRS. Pet.App. 50a. And these audits often lead to litigation.[3] Pet.App. 90a-91a.

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[3] Most courts that have addressed the issue have recognized that "litigation" is not limited to the context of a civil or criminal trial. The work product privilege covers materials prepared in a range of adversary postures; "'[a]dversarialness' is the touchstone

After all, as the District Court found, it was only because of the realistic prospect of disputes with the IRS that Textron's counsel created materials evaluating the likelihood of success in litigation and potential litigation strategies. *See* Pet.App. 108a ("[I]t is clear that the opinions of Textron's counsel . . . would not have been prepared at all 'but for' the fact that Textron anticipated the possibility of litigation with the IRS."). Further, these materials undeniably reflect counsel's "thoughts," "mental impressions," and "opinions," and are therefore the core "work product" of Textron's attorneys, *see Hickman*, 329 U.S. at 511, as they "will inexorably contain [counsel's] theory of the case and may communicate . . . some litigation strategy or settlement advice." *Sears, Roebuck & Co.*, 421 U.S. at 159-60; *see also Roxworthy*, 457 F.3d at 595, 597 (tax opinion rendered by an accounting firm at the request of counsel prior to the filing of a tax return is work product); *Long-Term Capital Holdings v. United*

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of this approach to the 'litigation' question." *In re Grand Jury Subpoena*, 220 F.R.D. 130, 147 (D. Mass. 2004). The Restatement of the Law Governing Lawyers thus defines "litigation" in the work product context to include an "adversarial proceeding before an administrative agency, an arbitration panel or a claims commission, and alternative-dispute-resolution proceedings such as mediation or mini-trial," or any proceeding in which "evidence or legal argument is presented by parties contending against each other with respect to legally significant factual issues." Restatement (Third) of the Law Governing Lawyers § 87 cmt. h (2000). This amply covers Textron's anticipated adversarial administrative proceedings and other disputes with the IRS. As the Sixth Circuit has explained, "a document prepared in anticipation of dealing with the IRS . . . may very well have been prepared in anticipation of an administrative dispute and this may constitute litigation within the meaning of Rule 26." *See United States v. Roxworthy*, 457 F.3d 590, 600 (6th Cir. 2006) (internal quotation marks omitted).

States, No. 3:01 CV 1290 (JBA), 2002 WL 31934139, at *8 (D. Conn. Oct. 30, 2002) (legal opinion obtained prior to sale of preferred stock is privileged against IRS subpoena); *Black & Decker Corp. v. United States*, 219 F.R.D. 87, 91 (D. Md. 2003) (documents containing tax analysis prior to filing tax return are work product).

The admonitions in *Hickman* regarding the unfairness and sharp practices that result when work product is not privileged are also vividly illustrated and borne out in this case. The government unapologetically concedes that it seeks these workpapers because they are a roadmap to Textron's self-assessed "soft spots" in its tax return. Appellant Br. at 31-32 (1st Cir. Jan. 25, 2008). The IRS admits that it does not want the workpapers for their factual content because the IRS indisputably has access to all of the facts underlying Textron's tax positions. Rather, the IRS intends to use the legal analysis of Textron's counsel as a "tool" in "the IRS's arsenal" that will "ease" its ability to challenge Textron's tax positions. Petition for Rehearing *En Banc* at 14-15 n.12 (1st Cir. Mar. 9, 2009). But "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Hickman*, 329 U.S. at 516 (Jackson, J., concurring). And the IRS has no special warrant or need for exception. The IRS' summons power is "'subject to the traditional privileges and limitations,'" *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (quoting *United States v. Euge*, 444 U.S. 707, 714 (1980)),[4] but it has ample tools to require taxpayers to

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[4] In *Arthur Young*, this Court held that the government was entitled to workpapers created by a corporation's independent auditor regarding the corporation's tax return, 465 U.S. at 813-14,

disclose relevant factual information.[5] Permitting the IRS, in addition, to demand the tax accrual workpapers of businesses during audits—which are inherently adversarial—would foster exactly the sort of sharp practices forbidden by the work product privilege. *See Roxworthy*, 457 F.3d at 595 ("[T]he IRS would appear to obtain an unfair advantage by gaining access to KPMG's detailed legal analysis of the strengths and weaknesses of [the taxpayer's] position. This factor weighs in favor of recognizing the documents as privileged."); *Delaney, Migdail & Young Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987) (where

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but nothing in that decision suggested workpapers created by the taxpayer's counsel lose their privileged status merely because they are shared with an auditor. To the contrary, the Court explained that the policies supporting the work product privilege were not implicated in *Arthur Young* because an independent auditor's "public watchdog" function is fundamentally different from a lawyer's role as counsel and advocate for his client. *See id.* at 817-18 ("The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. An independent certified public accountant performs a different role.").

[5] For example, the IRS has authority to create the forms (including tax return forms) with the specific information that the IRS deems necessary to be provided by taxpayers, *see* I.R.C. § 6011(a); to require disclosure of specific transactions such as the kinds of "listed" transaction by Textron that the IRS is evaluating, *see* Treas. Reg. § 1.6011-4; to require the detailed disclosure of book-tax differences, *see* IRS Schedule M-3 (Form 1120, used by the IRS in corporate taxpayer audits); to obtain, during an audit, factual information needed to ascertain the correctness of a tax return or determine a taxpayer's correct liability, *see* I.R.C. § 7602(a); and to issue administrative summonses for records and testimony not only of the taxpayer and its employees but also of third parties, *id.* §§ 7602(a)(2), (3).

requesting party sought "attorneys' assessment of the program's legal vulnerabilities in order to make sure it does not miss anything in crafting its legal case," it was "precisely the type of discovery the Court refused to permit in *Hickman*"). Without work product privilege, companies would be forced to turn over their most sensitive tax analyses to the IRS as well as other regulatory agencies and private litigants. *See* Pet. at 26. Any short-term benefit the First Circuit's decision provides to the Government or the plaintiffs' bar, however, would be far outweighed by the obstacles it creates for companies attempting to obtain efficient and candid advice of counsel and to comply fully with their financial reporting obligations.

II. THE FIRST CIRCUIT'S "FOR USE" TEST THREATENS TO UNDERMINE THE ATTORNEY-CLIENT RELATIONSHIP AND PUNISH BUSINESSES FOR THEIR PRUDENT RELIANCE ON COUNSEL

Beyond the specific tax accrual workpaper context addressed in this case, the "for use" test adopted by the First Circuit threatens to destroy businesses' ability to obtain candid and thorough analyses of litigation-related business matters. Unless this decision is reversed, it will directly harm American businesses, shareholders, regulatory agencies, and the public interest. Today, businesses routinely use counsel, *inter alia*, in (i) internal investigations to evaluate potential legal risks and ensure compliance with the law; (ii) legal analyses necessary to fulfill financial reporting obligations; and (iii) assessments of impending or current litigation affecting complex corporate transactions. In all of these contexts, companies routinely employ lawyers to evaluate

litigation risks, strategies, and settlement positions "in anticipation of" litigation to help them comply with legal obligations and make better business decisions. In a world governed by the "for use" test, adverse parties will routinely demand access to counsel's notes, analyses and other materials underlying counsel's work—but not necessarily shared with the client and protected by the attorney-client privilege—and businesses that diligently and aggressively investigate and consider issues arising from anticipated or ongoing litigation will be forced to divulge these sensitive materials to regulatory agencies or other adversaries.[6] The "for use" test thus will create an incentive *not to* investigate or consider such issues, which will harm the interests of companies, shareholders and ultimately the public at large. *See EEOC v. Lutheran Social Servs.*, 186 F.3d 959, 966 (D.C. Cir. 1999) ("Weakening the ability of lawyers to represent clients at the pre-claim stage of anticipated litigation [by reducing work product protection] would inevitably reduce voluntary compliance with the law, produce more litigation, and increase the workload of government law-enforcement agencies.") (internal quotation marks omitted).

Under the First Circuit's narrow conception of the work product privilege, companies will face the

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[6] Indeed, in civil suits against corporate defendants, plaintiffs stand to benefit from the *Textron* decision, *see* Michelle M. Henkel, *Textron Eviscerates the 60-Year-Old Work Product Privilege*, 125 Tax Notes 237, 241 (2009), and SEC Enforcement Director Robert Khuzami recently announced that, in light of the *Textron* decision, no company documents in the possession of an auditor should be regarded as privileged work product. *See* Yin Wilczek, *Khuzami: SEC in Final Stages on Cooperation Agreement, Skeptical of Work Paper Shield*, 5 Acct. Pol'y & Prac. Rep. (BNA) 1118 (Dec. 11, 2009).

constant threat of disclosure to litigation adversaries of their counsel's findings and analyses, because the most sensitive materials prepared by counsel often are not prepared for conveyance to the client, and they therefore fall entirely outside the protection of the attorney-client privilege. *See* 2 Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 791 (5th ed. 2007) ("[T]he [attorney-client] privilege extends only to client communications, while work product encompasses much that has its source outside client communications . . . ."). Often, these documents are created to preserve the results of counsel's investigations and formulate the finalized advice that is shared with the client. *See Hickman*, 329 U.S. at 511 ("Proper preparation of a client's case demands that [the lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . . ."). And many documents, including audit letters and tax accrual workpapers, are outside the attorney-client privilege because they are prepared in order to be shared with third parties assisting the client. 8 Charles Alan Wright et al. *Federal Practice and Procedure* § 2024 (2d ed. 1994). By eviscerating the work product privilege for all of these documents because they were not prepared for use in the litigation assessed, the First Circuit's test places "an untenable"—and unfair—"choice upon a company":

> If the company declines to make such analysis or scrimps on candor and completeness to

> avoid prejudicing its litigation prospects, it subjects itself ... to ill-informed decision-making. On the other hand, a study reflecting the company's litigation strategy and its assessment of its strengths and weaknesses cannot be turned over to litigation adversaries without serious prejudice to the company's prospects in the litigation.

Adlman, 134 F.3d at 1200.

A review of the contexts in which counsel routinely prepare analyses that would be instantly discoverable under the First Circuit's test illustrates the gravity and importance of these issues and the need for immediate review.

A. Internal Investigations and Compliance

Courts and the business community have long appreciated that "[v]oluntary compliance with the law often depends on sound legal advice" and "sound legal advice in turn often depends on the attorney-client and work product privileges." *Lutheran Social Servs.*, 186 F.3d at 966. This is because "[a] corporation's attorney ... is positioned to impart 'preventive' legal advice; she acts as a private law enforcement agent." John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. Rev. 443, 475 (1982). In particular, companies regularly commission internal investigations, led by counsel, upon discovery of potential violations of law or significant risks posed by company actions or products. These investigations are necessary to determine the relevant context and potential legal implications, and allow the company to take appropriate corrective action. And courts have recognized that because the "suspicion" of legal violations signals the possibility that litigation—

"criminal prosecutions, derivative suits, securities litigation, or even litigation ... to recover ... illegal payments"—may occur, internal investigations into such violations are performed "in contemplation of litigation." *In re Grand Jury Investigation*, 599 F.2d 1224, 1227, 1229-30 (3d Cir. 1979); *see also Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 445-49 (S.D.N.Y. 2004) (holding that corporate counsel's internal investigative material, shared with outside auditors in connection with an audit of internal controls, was privileged work product). Indeed, in these circumstances, "the potential for litigation [is] immeasurably intensified by [the company's] legal obligations to report any wrongdoing to its stockholders and to various governmental agencies." *In re Grand Jury Investigation*, 599 F.2d at 1229.

Nevertheless, under the First Circuit's test, because they are prepared under compulsion of law or for purposes of voluntary compliance and not "for use" in litigation, most internal investigative materials prepared by counsel—including notes and other materials underlying the investigation but not shared with the client—would no longer be protected as work product. The resulting "chilling effect" would inhibit "a company seeking legal advice." David M. Zornow & Keith D. Krakaur, *On The Brink Of A Brave New World: The Death Of Privilege In Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147, 149 (2000). The harm done would far outweigh any momentary advantage that the First Circuit's rule provides the IRS and other regulators.

For example, companies often turn to outside counsel and consultants to investigate, diagnose, and create remediation plans for potential environmental

harms and dangers. The process of evaluating and remedying potentially disastrous toxic torts must be undertaken in a quick and decisive fashion. *See Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1263 (3d Cir. 1993) ("We should encourage the voluntary, cooperative, and speedy resolution of workplace safety problems ...."). The materials developed in this context that reflect the mental impressions of counsel, including materials not shared with the client, have been traditionally afforded work product protection, even though not created "for use" in litigation. *See id.* at 1261 (work product privilege applied to an outside consultant's emissions report); *ECDC Envtl., L.C. v. N.Y. Marine & Gen. Ins. Co.*, 96 Civ. 6033 (BSJ)(HBP), 1998 WL 614478 (S.D.N.Y. June 4, 1998) (work product privilege applied to materials created during the investigation of an accidental spill of 3,000 tons of "spoils" into the ocean); *Bituminous Cas. Corp. v. Tonka Corp.*, 140 F.R.D. 381 (D. Minn. 1992) (work product privilege applied to materials generated during the course of discussions with an environmental agency about the investigation and clean-up of hazardous waste). By withholding the work product privilege from these materials, the "for use" test will discourage companies from employing counsel for such investigations, or discourage counsel from documenting their findings and analyses. This will undermine governmental efforts to encourage corporate self-evaluation and self-reporting, and benefit no one.

Companies also routinely employ counsel to aid their efforts to comply with the anti-bribery provisions of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-1 to -3, which prohibit U.S. companies from making offers and payments with corrupt intent

to foreign officials for the purpose of obtaining or retaining business. Violations of the FCPA can yield hefty civil fines and, in some cases, criminal penalties. *SEC v. Halliburton Co. & KBR, Inc.*, Litigation Release No. 20897A (SEC Feb. 11, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm (detailing $579 in civil and criminal fines for FCPA violations). FCPA violations are typically discovered by companies themselves and confirmed only after an internal investigation is completed. *See* Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 Stan. L. Rev. 1447, 1449 (2008). Although these investigations are effectively compelled by law, FCPA enforcement is nevertheless largely dependent upon companies self-reporting to the Government. *See id.* ("[T]he SEC and the DOJ have enthusiastically embraced the role that self-monitoring and cooperation play in assisting their investigations."). By eliminating the privilege for materials generated during such internal investigations, the "for use" test will undermine the policies and enforcement of the FCPA; again, with no corresponding benefit.

The Sarbanes-Oxley Act also effectively requires businesses to undertake internal investigations. "Under Sarbanes-Oxley, Audit Committees and company management are required to address whistleblower complaints and other indicia of potential wrongdoing or face liability." Paul D. Sarkozi, *Internal Investigations: An Overview of the Nuts and Bolts and Key Considerations in Conducting Effective Investigations, in Internal Investigations: Legal Ethical & Strategic Issues*, at 95, 99 (PLI Corp. Law Practice, Course Handbook Series No. 1564, 2006). "Similarly, under Delaware and other states' corporate

law, a failure to address 'red flags' may be found to constitute a breach of fiduciary duty." *Id.* But under the First Circuit's test, even though public companies that conduct investigations into whistleblower allegations regarding "any provision of Federal law relating to fraud against shareholders" (18 U.S.C. § 1514A(a)(1)) may very well "anticipate litigation," their counsel's findings and analyses will no longer be entitled to the protection of the work product privilege. In this context too, the First Circuit's test will discourage the prudent investigations that the law should foster and protect. Moreover, providing the government with the power to obtain and rely upon counsel's sensitive analyses in enforcement proceedings against businesses risks abandoning our adversarial system for one that is fundamentally inquisitorial.

B. Financial Reporting

The First Circuit's standard will also hamstring companies' ability to work efficiently with outside counsel on analyses that relate to financial reporting, in areas that extend far past the immediate context of tax accrual workpapers. Under U.S. GAAP—more specifically, FASB Accounting Standards Codification Topic 450[7]—companies must account in their financial statements for "loss contingencies," including "[o]bligations related to product warranties and product defects," "[p]ending or threatened litigation" and "[a]ctual or possible claims and assessments." Codification of Accounting Standards, Loss Contingencies, 450-20-05-3, 05-10 (FASB 2009). When

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[7] Topic 450 was formerly Statement of Financial Accounting Standards No. 5, or "FAS 5."

considering whether they must make a disclosure or record a loss, companies must consider, among other things, the probability of an unfavorable outcome and their ability to make a reasonable estimate of the amount of loss. *Id.* at 55-10. As with contingent tax liabilities, the company is expected by FASB to seek "[t]he opinions or views of legal counsel and other advisors," who generally are in the best position to analyze litigation risks, strategies, or settlement, as well as the strengths and weaknesses of the company's positions. *Id.* at 55-12. Such analyses are prepared by counsel because of litigation (or potential litigation) that counsel is overseeing and evaluating on a daily basis. But because these analyses generally are not prepared "for use" in the litigation, they would be freely available to adverse parties under the First Circuit's standard.

As applied in this context, the First Circuit's standard would lead to absurd and confused results. For instance, a company may request two identical analyses of litigation risks from the exact same counsel, but depending on the "use" for which the company seeks the analyses, counsel's underlying materials will be privileged in one instance and fair game for adversaries in the other. If the analyses are prepared to develop the company's strategy for actual use in the litigation, the underlying materials will likely be privileged. But if they are prepared to help the company gauge its potential litigation exposure in the context of financial reporting under FASB ASC Topic 450, or in cooperation with outside auditors,[8] the

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[8] As one court has explained, sharing privileged materials between a company and its auditor "is precisely the type of limited alliance that courts should encourage," because it furthers the

underlying materials would not be privileged. Even though "audit letters" from counsel to outside auditors constitute "legal analysis that falls squarely within *Hickman*'s area of primary concern—analysis that candidly discusses the attorney's litigation strategies, appraisal of likelihood of success, and perhaps the feasibility of reasonable settlement," *Adlman*, 134 F.3d at 1200—businesses would be forced to share these audit letters with adversaries, as well as a host of other sensitive analyses of "loss contingencies" regarding litigation or potential litigation. This development would seriously harm American businesses, many of which are regularly involved in high-stakes commercial litigation that could be dramatically influenced by the discoverability of their counsels' candid litigation analyses.

C. Analysis of Complex Transactions

Finally, corporations regularly rely on the assistance of counsel when engaging in business transactions that may result in litigation. *See, e.g., id.* at 1195, 1199 (noting that legal analysis of corporate transactions should be privileged because "whether to undertake the transaction and, if so, how to proceed with the transaction, may well be influenced by the company's evaluation of the likelihood of success in litigation"). For example, when conducting diligence with respect to such a business combination, a company will request an assessment of the impact of the counterparty's pending or potential litigation on the combined enterprise. Because the point of such analyses is to assess the outcome of litigation or anticipated litigation, these materials have

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company's and the public's interests in detecting and rooting out corporate malfeasance. *Merrill Lynch & Co.*, 229 F.R.D. at 448.

traditionally been protected by the work product privilege on behalf of the combined entity. *See id.* at 1199-200; *see also* Anne King, Comment, *The Common Interest Doctrine and Disclosures during Negotiations for Substantial Transactions*, 74 U. Chi. L. Rev. 1411, 1423 n.70, 1424 n.77, 1425 n.80, 1429 n.107 (2007) (discussing application of work product privilege in the context of mergers and collecting cases). Because they are not prepared "for use" in litigation, however, the First Circuit's test categorically excludes their protection. By discouraging companies from relying on or requesting these analyses, the "for use" test will reduce the effectiveness of diligence that companies engage in before undertaking such transactions and, ultimately, benefit no one.

III. THE BUSINESS COMMUNITY NEEDS THIS COURT'S GUIDANCE

As this Court has recognized, "[a]n uncertain privilege, or one that purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. There is now a well-defined three-pronged split on the appropriate standard for discerning whether materials are entitled to work product protection: the majority "because of" test; the Fifth Circuit's "primary motivating purpose" test; and the First Circuit's new "for use" test. *See* Pet. at 12-16. This split leaves the Chamber and its members unable to assess whether their attorneys' materials will be privileged or subject to subpoena or discovery, and for many of the Chamber's members will effectively make the most limited conception of the privilege—that afforded by the First Circuit's "for use" test—the law of the land.

The "for use" test provides litigants seeking the disclosure of sensitive legal analyses and related materials with a massive incentive to forum shop and file suit in the First Circuit whenever possible. And forum shopping will often be possible because American businesses typically are subject to suit in numerous jurisdictions. Companies potentially subject to suit in the First Circuit will, as a practical matter, be forced to assume that the "for use" test applies when dealing with counsel in their internal investigations, financial reporting, and transactions. Without review by this Court, these companies will need to alter fundamentally (and for the worse) the ways in which they ensure legal compliance and make significant business decisions, and the business community will be forced to grapple with a new reality of unfair and abusive practices by government agencies and litigation adversaries.

CONCLUSION

The petition for *certiorari* should be granted, and the judgment should be reversed.

Respectfully submitted,

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